SUPPLEMENTAL APPENDIX

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re Application of	)	
CONTINENTAL BROADCAST-	)	Docket No. 16050
ING, INC., NEWARK, N.J.	)	File No. BR-174
For Renewal of License of Sta-	)	
tion WNJR, Newark, N.J.	)	

APPEARANCES

Paul Dobin and *Martin J. Gaynes, Esqs.*, on behalf of Continental Broadcasting, Inc; and *Joseph Stirmer* and *James K. Edmundson, Jr., Esqs.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION
(Adopted November 26, 1968)

COMMISSIONER WADSWORTH FOR THE COMMISSION: CHAIRMAN HYDE DISSENTING AND ISSUING A STATEMENT: COMMISSIONERS COX AND H. REX LEE NOT PARTICIPATING.

1. This proceeding involves the application of Continental Broadcasting, Inc. (Continental or WNJR), a wholly owned subsidiary of Rollins, Inc.,[1] for renewal of license of AM station WNJR, Newark, N.J. Continental's

[1] Rollins, Inc., is a public corporation with its stock being listed on the American Stock Exchange. O. Wayne Rollins, the president of Rollins, Inc., and also of the licensee corporation, has owned about 48 percent of the voting stock in Rollins, Inc., since 1960, and together with his family has voting control of the corporation by virtue of their combined 67-plus percent ownership of the voting stock. The Rollins home office is in Wilmington, Del. Through direct ownership or control of wholly owned subsidiaries, Rollins, Inc., operates seven AM, three TV, and two FM stations.

renewal application[2] was designated for hearing by Commission order (FCC 65-514, released June 10, 1965) following a field investigation into the operations of the station which raised a number of questions bearing upon whether Continental possessed the requisite qualifications to remain the licensee of WNJR. The following issues were specified for hearing:

> 1. To determine whether in its written response to the Commission's Notice of Apparent Liability or in its oral statements to the Commission's staff the applicant misrepresented facts to the Commission and/or was lacking in candor;
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> 2. To determine whether the applicant falsely represented to the Commission or its staff that the 139 "contracts" submitted to the Commission's staff during the course of an investigation of WNJR were, in fact, the actual documents which the applicant allegedly required Celebrity Consultants to file with WNJR on behalf of each sponsor who advertised during "Celebrity Time"; or whether such "contracts" were falsified in order to conceal or misrepresent the actual facts with respect to the relationship which existed during the period of the latest renewal and up to the present, between the applicant, its employees and Celebrity Consultants;
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> 3. To determine whether the principals of the applicant have exercised adequate control or supervision over the operation of WNJR in a manner consistent with the applicant's

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[2] The license for station WNJR was last renewed on Feb. 8, 1961, for the period ending June 1, 1963. An application for renewal of license was filed on Mar. 13, 1963.

responsibility during the period of the applicant's most recent license renewal.

4. To determine whether the applicant operated its station contrary to and/or inconsistent with the provisions of section 317 (a)(1) and (c) of the Communications Act and sections 73.111, 73.112, and 73.119 of the Commission's rules;

5. To determine whether the applicant failed to file certain agreements regarding the sale of time periods to time brokers in violation of section 1.613(c) of the Commission's rules;

6. To determine whether, in light of the evidence adduced under the foregoing issues, the applicant has reflected the necessary qualifications to continue to be the licensee of station WNJR;

7. To determine whether a grant of the above-captioned application would serve the public interest, convenience, and necessity.

2. The *Initial Decision* of Hearing Examiner Isadore A. Honig (FCC 67D-26, released June 23, 1967) would grant WNJR's application and renew the license for a period of 1 year. The Commission's Broadcast Bureau filed exceptions to the *Initial Decision* and urges denial of the application. WNJR filed no exceptions but filed a reply to the Bureau's exceptions and urges that the examiner's decision be affirmed. The Commission heard oral argument on June 4, 1968. The examiner's findings have been considered in light of the exceptions and they are adopted with the modifications contained in this decision and in our rulings on the exceptions as set forth in the appendix. Since we do not agree with the examiner's ultimate conclusion that the application

for renewal of license should be granted, the conclusions of the *Initial Decision* are adopted only insofar as they are consistent with this decision and our rulings on exceptions. We do not adopt the examiner's conclusions in paragraphs 33 through 43.

3. Our review of the record evidence and the examiner's findings of fact and his subsidiary conclusions compels us to conclude that the applicant has not reflected the necessary qualifications to continue to be the licensee of WNJR and that a grant of the application would not serve the public interest.

4. It is unnecessary to restate in detail the examiner's extensive findings of fact. It is clearly established in the findings[3] that during an official Commission investigation of station WNJR on March 6, 1963, the manager of the station, Leonard Mirelson, was asked by Commission investigators to produce the documents relating to the program, "Celebrity Time." The manager made available to them only eight of 147 documents in the "Celebrity Time" program file and deliberately did not bring to their attention any of the remaining pertinent documents in his possession. The effect of the manager's conduct in selecting and handing over for inspection the small number of documents the investigators saw was to give them a distorted and misleading view of the manner of the operation of the program from the standpoint of control and the time-brokerage implications and to misinform them as to the arrangements with sponsors for the program in actual practice. The examiner concluded[4] as follows:

> Thus, the examiner concludes that the manager's action on the occasion in question in

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[3] See findings of the *Initial Decision*, pars. 68-71.

[4] See conclusions of the *Initial Decision*, par. 3.

not making available to investigators for inspection the entire file of the 147 documents for "Celebrity Time" constituted a serious lack of candor by an executive employee of the licensee in connection with an official Commission investigation.

5. As indicated by the findings,[5] on January 22, 1964, the Commission issued to the licensee of WNJR a notice of apparent liability for forfeiture, charging in essence that a Commission investigation of WNJR revealed the broadcast by the station for a period prior to March 9, 1963, of a program "Celebrity Time" pursuant to time brokerage contracts with an advertising agency, Celebrity Consultants, and that copies of the contracts with the time broker had not been filed by the licensee with the Commission within 30 days of execution as required by section 1.613(c) of the rules. The licensee filed a response and opposition to the notice on March 16, 1964,[6] contending in effect that the arrangement for the "Celebrity Time" program with the agency did not involve a time brokerage contract. Moreover, the response stated that in July 1962, station WNJR required the agency to enter into individual contracts with the station on behalf of each sponsor; that these contracts had been examined by the the FCC staff when it investigated this matter; and that the contract itself showed that the station had dealt with the agency as a regular advertising agency which was paid a commission and, therefore, not as a time broker. In footnote 5 to the response it was stated that the station considered its

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[5] See findings of the *Initial Decision*, pars. 77, 82-84.

[6] By a letter dated June 24, 1964, the licensee withdrew its response and opposition and also submitted a check in payment of the forfeiture.

earlier agreement with the agency terminated in July, 1962. The examiner concluded[7] as follows:

> Unquestionably, however, the evidence developed in the hearing shows (par. 84, of finding, supra) that the factual representations set forth in the sworn response and opposition to the Commission's notice of apparent liability for forfeiture, signed by O. Wayne Rollins as the licensee's president and filed with the Commission on March 16, 1964 were largely inaccurate.

The examiner also concluded (par. 4) that the inclusion of erroneous statements in the response as to when contracts with Celebrity Consultants had terminated involved negligence on the part of Rollins' associates.

6. Moreover, it is also clearly established[8] that on April 15, 1964, Commission investigators again visited station WNJR and asked to look at the contracts for advertising on the "Celebrity Time" program concerning which documents there had been representations made in the licensee's response of March 16, 1964. The WNJR station manager thereupon produced for inspection some 147 documents as being original contracts which had been executed between the station and the advertising agency on behalf of various sponsors on the "Celebrity Time" program during the period from July 1962 to March 1963. Only eight of these documents (those on top of the pile and white in color) were authentic and original contracts (WNJR Ex. 5, pp. 140-147) as represented by the licensee in its response. The remainder (139 documents on goldenrod-colored paper received in evidence as (WNJR Ex. 5 pp. 1-139) were not the actual or original documents which had been drawn up as

[7] See conclusions of the *Initial Decision*, par. 4.

[8] See conclusions of the *Initial Decision*, pars. 5-6.

contracts for advertising between WNJR and the advertising agency, Celebrity Consultants (WNJR Ex. 6, pp. 1-143). Instead, these 139 documents were fabricated or false contracts which had been prepared by a WNJR salesman at the direction of the station manager. The examiner concluded[9] as follows:

> In sum, the evidence does require the conclusion, in response to issue 2, supra, that: (1) the WNJR station manager falsely represented to the Commission's staff that the 139 documents turned over to them on April 15, 1964, during an investigation of WNJR were the actual documents received from Celebrity Consultants; and (2) that the 139 documents were falsified by a WNJR salesman, at the direction of the station manager, in order to conceal the actual facts of the relationship which existed in the period July 1962 to March 1963 between the applicant, its employees, and Celebrity Consultants.

7. We adopt the foregoing conclusions of the hearing examiner and further conclude that the manager's gross misconduct and fraud on the Commission must be imputed to the licensee because of its failure to exercise adequate control and supervision over the management and operation of WNJR consistent with its responsibilities as a licensee. *Eleven Ten Broadcasting Corp.* (KRLA), 32 FCC 706,22 R.R. 699 (1962), reconsideration denied 33 FCC 92, 22 R.R. 702n (1962), affirmed *sub nom. Immaculate Conception Church of Los Angeles, et al. v. FCC,* 116 U.S. App. D.C. 73, 320, F.2d 795, 25 R.R. 2128a (1963), cert. denied 375 U.S. 904 (1963); *KWK Radio, Inc.*, 34 FCC 1039 (1963), affirmed 119 U.S. App. D.C. 144, 337 F. 2d 540 (1964), cert. denied 380 U.S. 910 (1965).

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[9] See conclusion of the *Initial Decision*, par. 6.

8. The examiner found [10] that Wayne Rollins, president of Rollins, Inc., and of the licensee corporation, relied upon Al Lanphear, vice president in charge of radio, and Tim Crow, director of quality control, to effectuate supervision and control of the operations of the various Rollins radio stations, including WNJR. The findings and conclusions demonstrate that Rollins, Crow and Lanphear, the so-called home office officials in Wilmington, Del., failed to exercise adequate control and supervision over the operation of WNJR and the "Celebrity Time" program in particular. The station manager's lack of candor and misrepresentations in dealing with Commission investigators on March 6, 1963, the misstatements of fact in the opposition to the notice of forfeiture filed March 16, 1964, and the spurious documents furnished to the Commission's investigators on April 15, 1964, all involved the so-called agency show, "Celebrity Time," and the contracts for the program. However, despite the fact that the "Celebrity Time" program and the manner in which it was conducted was brought to the attention of the Rollins home office on several occasions, the home office officials at no time conducted a thorough or meaningful investigation of the matter.

9. The findings[11] show, for example, that on September 26 and 27, 1962, Crow and Frank Minner, the Rollins controller, visited station WNJR for the purpose of examining the operation of the station from the standpoint of observing the broadcast of programs on the air and of checking various records maintained at the station. On the evening of September 26, they monitored WNJR programs, including the broadcast of "Celebrity Time." The next day Minner compared the September

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[10] See findings of *Initial Decision*, par. 140; conclusions, par.

[11] See findings of the *Initial Decision* pars. 56-48, 76, 157.

26 program logs with station contract files and noted that for some announcements on the agency shows the station did not have individual contracts. Crow was told by Minner that there were some documents missing from several agency shows (Tr. 4715-16), but Crow did not look at any contracts or agency orders and did not examine the "Celebrity Time" contracts file. On his return to Wilmington, Crow wrote Rollins a report which made clear that a substantial number of clients were on the air without any contracts to cover them and which also raised questions concerning the "Celebrity Time" show (WNJR Ex. 44). Rollins discussed the matter with Lanphear. Lanphear visited WNJR on October 10 and 11, 1962 and questioned Mirelson as to whether he had the contracts for the individual sponsors, and Mirelson's reply indicated to Lanphear that he was obtaining them, but Lanphear did not examine any of the contracts for the special agency shows, including "Celebrity Time" (Tr. 5741-2).

10. The findings[12] also show that in August 1963, the Commission sent Norman King of Celebrity Consultants a letter (Br. Bur. Ex. 31) which made reference to a discussion by King with members of the Commission's staff during a week of July 21, 1963, concerning the former "Celebrity Time" program on station WNJR. A copy of the letter was given by King to Mirelson, who in turn brought it to the attention of Crow at the home office soon after August 8, 1963. The examiner found (par. 74) that "Crow saw the letter but made no inquiry of Mirelson at the time regarding the manner in which the 'Celebrity Time' program had been conducted or the other matters raised in the letter to King." Lanphear also saw the Commission's letter to King sometime in August 1963.

11. It is also noted that no investigation of the "Celebrity Time" program and contracts was made by

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[12] See findings of the *Initial Decision* par. 74.

the officials in the Rollins organization in Wilmington before making the sworn representations to the Commission in the response and opposition to the Commission's notice of apparent liability of January 22, 1964. The findings[13] show that Mirelson, the station manager, was never provided with a copy of the notice and neither read the document nor discussed it with anyone from the Rollins home office. He was not consulted as to whether the licensee should oppose the forfeiture but was merely requested by Crow to forward to him representative contracts pertaining to "Celebrity Time." The findings (pars. 86-87) show that Mirelson was not afforded an opportunity to read the response and opposition before it was filed with the Commission on March 16, 1964. Mr. Rollins assumed that Lanphear would discuss the proposed opposition and the charges in the notice of apparent liability with Mirelson since they pertained to the operation of, and directly affected, station WNJR, but he never inquired whether Lanphear had in fact done so. Furthermore, he did not instruct anyone to go and look at all of the contracts for "Celebrity Time" at station WNJR because of his confidence in Mirelson,[14] and because he had received from Crow three documents which the latter characterized as typical contracts for "Celebrity Time."

12 We believe that the examiner properly concluded (par. 29) as follows:

> At no time, however, was there any reasonably careful inspection of the "Celebrity Time" documents file made by the home

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[13] See findings of the *Initial Decision*, pars. 81, 85-87.

[14] On Jan. 21, 1963 (approximately a month and one-half before termination of the "Celebrity Time" program on Mar. 9, 1963), Mirelson had stated in a letter to Crow that "we now have separate contracts with all clients" (WNJR Ex. 49, examiner's findings, pars. 59, 81).

office to ascertain if WNJR was obtaining contracts for "Celebrity Time" in the form required under the home office instructions. In September 1962, the quality control director was shown some of the documents for the so-called agency shows which the Rollins controller had found were "not complete and accurate." There is no evidence to establish that such documents were part of the "Celebrity Time" file.[15] In any event, if Crow had made a review of the entire "Celebrity Time" file at that time, the variety of information in the documents representing advertising obtained by the freelancers and the pronounced difference in appearance between them and the eight contracts in proper form obtained by the station manager from the Celebrity Consultants agency head would immediately have signalled to him that the home office instructions had not been followed. Certainly he could not have failed to see, too, that the WNJR manager's signature did not appear on a single contract form. So far as appears from the record, the Rollins' home office did not examine the "Celebrity Time" contracts file for any purpose after September 1962.

13. It is obvious that a minimal degree of responsible supervision either during the period the "Celebrity Time" program was broadcast or following its termination could have averted the unconscionable fraud which Mirelson perpetrated on the Commission on April 15, 1964, as well as the misrepresentations of fact in the licensee's opposition to the Commission's notice of apparent liability filed March 16, 1964.

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[15] The examiner found (par. 56) that "neither Minner nor Crow recalled at the hearing whether these deficiencies detected by Minner on Sept. 27, 1962, related to 'Celebrity Time.'"

14. WNJR contends that its license should be renewed because the station manager's misconduct was committed without the knowledge or approval of the Rollins' home office officials, the manager misled both the licensee and the Commission, and his transgressions occurred in spite of attempted controls in the operation of the station.

15. In denying an application for renewal of license in the *KRLA* case, supra, we considered and rejected the licensee's contention that lack of knowledge absolved it from responsibility for the fraudulent conduct of its station manager. We said:

> Inherent in such contention, however, is the view that a licensee who delegates to persons it deems responsible, authority to operate and manage a station cannot be held responsible for their activities if it is unaware of them. This is, of course, a completely untenable view. Retention of effective control by a licensee of the station's management and operation is a fundamental obligation of the licensee, and a licensee's lack of familiarity with station operation and management may reflect an indifference tantamount to lack of control. (Citing *Mile High Stations Inc.* (KIMN), 20 R.R. 345 (1960)).

16. In the instant case, the examiner concluded (par. 32) that the licensee did not exercise adequate control or supervision over the operation of WNJR in a manner consistent with the licensee's responsibility during the most recent license renewal period (1961-64). We adopt this conclusion because it is supported by the record evidence and the examiner's findings of fact. We do not share or accept the examiner's view (par. 42) that the licensee's deficiency on this score was not

characterized by lack of interest in or lack of concern for, the proper conduct of the station's affairs.

17. The examiner's findings and conclusions clearly show that the principals of the licensee failed to exercise minimal, let alone a reasonable degree of care in determining the status of the "Celebrity Time" contracts file and the manner in which the program was conducted. It is evident that the station manager was able to conduct the "Celebrity Time" program in the haphazard manner shown by this record because of the detachment and indifference of the Rollins' home office officials.

18. The record and the examiner's findings and conclusions[16] show that the control measures utilized by the home office in Wilmington consisted of periodic monitoring (22 monitors between February 1961 and October 1964) of WNJR broadcasts by a person not employed within the Rollins organization, and comparison by Crow of the data compiled with the program logs. In addition to these monitors, the record shows that between September 1962 and December 1964, Crow personally conducted only three operations audits of WNJR, involving taping of programing, examination of logs and contracts files. Lanphear, the operational head for radio stations, made only periodic visits to confer with the WNJR station manager. Wayne Rollins occasionally called the WNJR manager on some particular matter of concern to him.

19. The examiner himself concluded (par. 28) that the above described control and supervisory activities of those in the Rollins home office did not suffice to prevent serious violation of Commission's *Rules* and Rollins' policies as well as misconduct by station employees which reflect adversely upon the renewal applicant.

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16 See conclusions of the *Initial Decision*, par. 26.

20. We agree with the examiner's following statement in his conclusion (par. 32):

> It is not enough that a licensee should issue instructions, detect infractions, make occasional visits, and engage in endless correctional correspondence with its station manager. The licensee of a broadcast station has the paramount obligation to apply effective measures to forestall violations and, in those instances where they nevertheless do happen despite reasonable preventive measures, to take additional steps as required to assure against any recurrences. This obligation the licensee herein obviously failed to discharge. In this connection, the examiner is constrained to point out that the evening hours period of operation at station WNJR received not alone from the station manager but also from the principals of the licensee far less direct supervision than was required in order to maintain proper control.

21. WNJR contends that the Rollins home office, through its regular control procedures, would have discovered the true facts concerning "Celebrity Time" and its contracts before the Commission investigation if the manager had not withheld this information from the home office. This contention is not supported by the record. As shown above, the home office was on notice as early as September 1962, that not all contracts for the agency shows were in the files, it was on notice that the logging procedures for the "Celebrity Time" program were not being followed, and it was on notice that other questions concerning the manner of operation of the "Celebrity Time" program had been raised, but, as stated by the examiner, "at no time, was there any reasonably careful inspection of the 'Celebrity Time' documents file made by the home office."

22. WNJR also contends that the KRLA and the *KWK* cases, supra, are not applicable here because those cases are based on licensee indifference to control of station operation, whereas in this case there was no such indifference to control of station operation, whereas in this case there was no such indifference on the part of the licensee. In the *KRLA* case we said that a licensee's lack of familiarity with station operation and management may reflect an indifference tantamount to lack of control. In the *KWK* case we said[17] that because of the licensee's "detachment, if not indifference" to the details of the treasure hunts involved, it was evident that the station manager was able to move unrestrained in his fraudulent hiding of the treasures. We believe that the record in this case clearly shows that it was the licensee's detachment and indifference and its failure to exercise adequate control and supervision over the operation of the station that permitted the station manager to perpetrate a gross and willful fraud on the Commission during the course of an official investigation.

23. The cases cited by WNJR, *Mark Twain Broadcasting Co.*, 21 R.R. 238 (1960), and *Washington Broadcasting Co. (WOL)*, 8 R.R. 2d 1267 (1966), are inapposite to this proceeding. In the *Mark Twain* case, which involved an application for renewal of license, the examiner concluded that there was no intent to deceive the Commission, and that the discrepancies in the transmitter logs filed with the Commission were of an engineering nature and not readily discernible by the principal officer and stockholder who had only limited technical knowledge. No exceptions were filed in that case and the Broadcast Bureau filed a statement in support of the *Initial Decision.* The Commission, by order, made the *Initial Decision* effective immediately (29 FCC 1313 (1960)). In the *WOL* case, which involved an assignment

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[17] 34 FCC 1039, at 1042.

of license, the proposed assignee filed with the Commission as part of its application a program survey containing falsehoods of an employee that a certain person had been interviewed in connection with the survey. The examiner concluded that the misrepresentation made to the Commission through the employee did not attach to the principals of the assignee, because the latter were not negligent concerning the conduct of the employee and "took immediate steps to investigate all the facts surrounding the matter" as soon as a question was raised (8 R.R. 2d 1267 at 1291). In the instant case, the licensee was repeatedly on notice but made no meaningful investigation to determine the facts.

24. In evaluating the responsibility of the licensee for the actions of its manager, the examiner stated in paragraph 34 of his conclusion that while "the licensee here cannot avoid responsibility for the misconduct of its station manager in dealing with the Commission. Nevertheless, in making a judgment as to the licensee's qualifications to retain the status of a licensee, it is important to bear in mind that the WNJR manager was not a 'principal' of the licensee." The Broadcast Bureau contends that Mirelson, the station manager, should be considered a principal of the licensee rather than a mere employee. We note that in reaching his conclusion that Mirelson was not a "principal" of the licensee, the examiner found that his stock ownership in Rollins, Inc., the parent corporation of the licensee, never exceeded 5,100 shares (less than two-tenths of 1 percent of the total ownership); that he was never an officer or director of the licensee corporation or of Rollins, Inc.; and that whatever policy functions he exercised as manager had in effect been delegated to him by the Rollins home office in Wilmington. We also note that the examiner found Crow to be a principal, although he was neither an officer nor director and owned less than 2,500 shares in Rollins, Inc. (less than one-tenth of 1 percent ownership interest).

25. We believe that there are compelling facts of record which indicate that the station manager, in effect, was a principal of the licensee and not a mere employee. The record clearly establishes that Mirelson was the general manager of station WNJR and as such was the individual charged with full responsibility for directing the day-to-day operation of the station. He had a compensation arrangement whereby, in addition to salary, he shared on a graduated basis in the net profit of WNJR. He owned stock in Rollins, Inc., the parent of the licensee, and his stock holdings exceeded that of Crow and Lanphear who were found to be principals.[18] Even after the Rollins home office became fully aware of his gross fraud on the Commission, he nevertheless continued in his same capacity and under the same financial arrangements for over 7 months, at which time he was made regional sales manager of WNJR, the position he now holds. We believe that these facts are fully consistent with the conclusion that Mirelson was a principal and not a mere employee. We have held that the fact that a station manager is not an officer or director of a licensee is irrevelant in determining the licensee's responsibility for his conduct. See *Eastern Broadcasting Corp.*, 8 FCC 2d 611 (1967). We do not base our decision on a determination that Mirelson is a principal of the licensee. We hold that the licensee must be held responsible for the gross misconduct of its station manager under the circumstances shown in this case where it has been clearly established that the licensee failed to exercise adequate control and supervision over the operation of the station consistent with its licensee responsibilities.

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[18] During oral argument counsel for the Broadcast Bureau and counsel for WNJR made reference to Mirelson's stock ownership as being worth a third of a million dollars (Tr. 6828 and 6832). We do not, however, accept this valuation as an established fact of record, and therefore, give it no weight.

26. In addition to the foregoing misrepresentations and fraud practiced on the Commission, there are other examples of what occurred as a result of the licensee's failure to exercise an effective sense of responsibility for station operation and management.[19] The examiner found (par. 137) that as early as December 1961, the Rollins' home office became aware, through an examination of the WNJR program logs by Crow, that the log had not been maintained for over one-half hour during the period the "Celebrity Time" program was broadcast on November 30, 1961. The examiner further found and concluded (pars. 17 and 28) that during the succeeding 9-month period between January 1 and September 25, 1962, there were 64 days (or 28 percent of the time) when the program log during the "Celebrity Time" program was not maintained. Moreover, during this same period, there were numerous instances when no elapsed time for commercial announcements on "Celebrity Time" was shown but only the beginning thereof. This particular logging violation was committed on 103 of the "Celebrity Time" programs. Furthermore, between

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[19] The examiner concluded (par. 31) that the listening public was not assured of a desirable broadcast service from several aspects of the manner of operation of WNJR in the period under consideration. The examiner concluded, in part, as follows:

> "Finally the nadir in programing service emanating from WNJR appears to have been reached with the identical half-hour program was broadcast five evenings in the same week. It is questionable whether the service provided by the station was much better when 3-hour programs broadcast on Wednesday and Thursday were again repeated on tape on Friday of the Saturday of the same week. Moreover, despite an understanding between the station manager and the announcer on the program not to repeat such program more than one time, a particular 3-hour program was not only rebroadcast on Nov. 25, 1964, but also repeated on Nov. 26 and 28, and Dec. 1."

January 1962 and March 1963, there were many occasions when a contemporaneous program log for the "Celebrity Time" program was not maintained.

27. We also rest our denial of the renewal application on the licensee's lack of licensee responsibility as evidenced by its inattention to the station and the operation thereof in violation of sections 73.111 and 73.112 of our rules concerning proper maintenance of program logs (issue No. 4). The examiner concluded (par. 16) that during the license period under consideration, the Rollins' home office was repeatedly made aware that accurate program logs were not being maintained by WNJR. The examiner concluded in this regard that his findings demonstrate numerous instances where the lengths of commercials were incorrectly reported in the WNJR program logs; instances where commercial announcements were not logged; instances where announcements were logged at times other than the actual times of broadcast; and instances (two) where the logs contained a forged signature in the operator's column. The examiner further concluded (par. 16) that "the aforementioned logging infractions were committed between August 1961 and December 1964 and require the conclusion that the licensee repeatedly failed to comply with the provisions of section 73.111[20] and 73.112 of the rules due to the failure of WNJR properly to maintain program logs." The examiner also concluded (par. 17) that the logging deficiencies which occurred in the "Celebrity Time" program "constituted further violations of sections 73.111 and 73.112 of the rules."

28. In addition to the foregoing, the examiner also concluded (par. 15) in response to issue No. 5, that "the licensee entered into five time brokerage contracts

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[20] The reference in par. 16 of the conclusions to sec. 73.113 of the rules is an obvious typographical error, this reference should read sec. 73.111.

between May 1963 and March 1964," and that "the licensee wilfully and repeatedly violated section 1.613(c)[21] of the rules by failing to file each of these contracts with the Commission within 30 days of its execution."

29. The examiner concluded (pars. 20, 21, and 22) that no violation of section 317(a)(1) of the Communications Act and section 73.119 (a) and (b) of the rules occurred by reason of WNJR's failure to broadcast sponsorship identification announcements in the case of those freelancers who appeared on "Celebrity Time" and made payments indirectly to the station for program time, and in the case of those time brokers who made payments to WNJR for program time out of their own pockets when they did not receive sufficient revenue from sponsors. The examiner was of the view that the payments made by the freelancers in connection with their appearance on "Celebrity Time" was not made for the broadcast of "matter" within the sponsorship identification provisions of the act and rules since, at most, they were interested in obtaining personal exposure on the air. The examiner also concluded that in the case of Joe Craine, one of the parties to a time brokerage arrangement with WNJR, no sponsorship identification announcement was required because the only "benefit" he derived from his broadcast was his exposure as an announcer.

30. The Broadcast Bureau has excepted to the examiner's above conclusions as an erroneous interpretation of the law and contends that it should be concluded that an individual or agency purchasing broadcast time under the circumstances shown must be announced as a sponsor pursuant to section 317(a)(1) of the act.[22] We

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[21] The reference in par. 15 of the conclusions to sec. 1.316(c) of the rules is a typographical error, and this reference to the rules should read sec. 1.0613(c).

[22] 47 U.S.C. sec. 317(a)(1).

agree with the Bureau and, therefore, do not adopt the examiner's conclusions in paragraphs 20, 21, and 22. Section 317(a)(1) of the act provides that all matter broadcast by any radio station for which any money, service, or other valuable consideration is directly or indirectly paid the station so broadcasting, by any person, shall, at the time the same is so broadcast, be announced as paid for by such person. Section 73.119 of the rules implements this statutory provision. The language of the act is clear and includes "all matter" broadcast for which payment is made to the station. The "benefit" derived by the purchaser of the broadcast time is not the determinative factor as to whether an announcement should be made. In the *Matter of the Liability of United Broadcasting Co. of New York, Inc.*, 4 R.R. 2d 167 (1965), the Commission held that where a time-broker arrangement was contemplated, but the purchaser of the time never sold it, and, during the broadcast period involved, the time was the exclusive property of the purchaser, an appropriate announcement was required by section 317 of the act and rule 73.119.

31. WNJR contends that the questions raised by the Bureau concerning sponsorship identification appear to be ones of novel impression which, it feels, have been correctly decided by the examiner, but that if the Commission should hold the examiner in error, the rulings should be given prospective effect only and not applied retroactively. We believe that the language of the act is clear and that the questions raised are not novel. Although we find that WNJR failed to make proper sponsorship identifications, we reach our ultimate determination in this case without reliance on these violations of the act and the Commission's rules.

32. As we have indicated above, the Commission must insist upon the effective exercise by the licensee of actual control over station operation and management, and it is only by holding the licensee accountable for the

operation and management of the station that there can be any assurance that the operation and management will be responsible. The degree of responsibility imposed and the standard of conduct required are the same for all licensees, irrespective of their form or the relative size of their operations. (See *Prattville Broadcasting Company*, 4 FCC 2d 555 (1966), citing *KWK Radio, Inc.*, supra, and *Eleven Ten Broadcasting Corp.*, supra.) A multiple station owner, or an absentee owner, is subject to the same degree of responsibility for adequate supervision and control over station operation as a local station owner who is integrated in ownership and management. To hold otherwise would result in giving an added benefit to absentee ownership as compared to local ownership.

33. It appears that in reaching his conclusion (par. 43) that a renewal of license for a period of 1 year would be appropriate, the examiner may have been influenced by the fact that the licensee has now taken certain corrective measures to forestall the recurrence of the filing violations as well as the misrepresentations to the Commission and has acted "to clear the Augean stable at Newark." However, a renewal applicant must be judged even more on the basis of its past than on its promises for the future. We must look to that record in determining whether the applicant herein has reflected the necessary qualifications to continue to be a licensee. Viewing that record in a light most favorable to the applicant, we are compelled to conclude that it has not reflected the necessary qualifications to continue to be the licensee of station WNJR.

34. The facts as found in this case are irreconcilable with a public interest finding. We have carefully examined the entire record in this proceeding, and we are unable to find any mitigating circumstances which would justify a grant of a renewal of license even for a period of 1 year. While nonrenewal of the license is a severe sanction, we have reached this decision only after

a thorough consideration of the entire fact situation. See *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

35. Accordingly, *It is ordered*, That the above-captioned application (BR–174) of Continental Broadcasting, Inc., for renewal of license of Station WNJR, Newark, N.J., *Is denied;* and

36. *It is further ordered*, That in order to enable Continental Broadcasting, Inc., to wind up its affairs, *It is authorized* to operate station WNJR until 12 midnight December 31, 1968.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

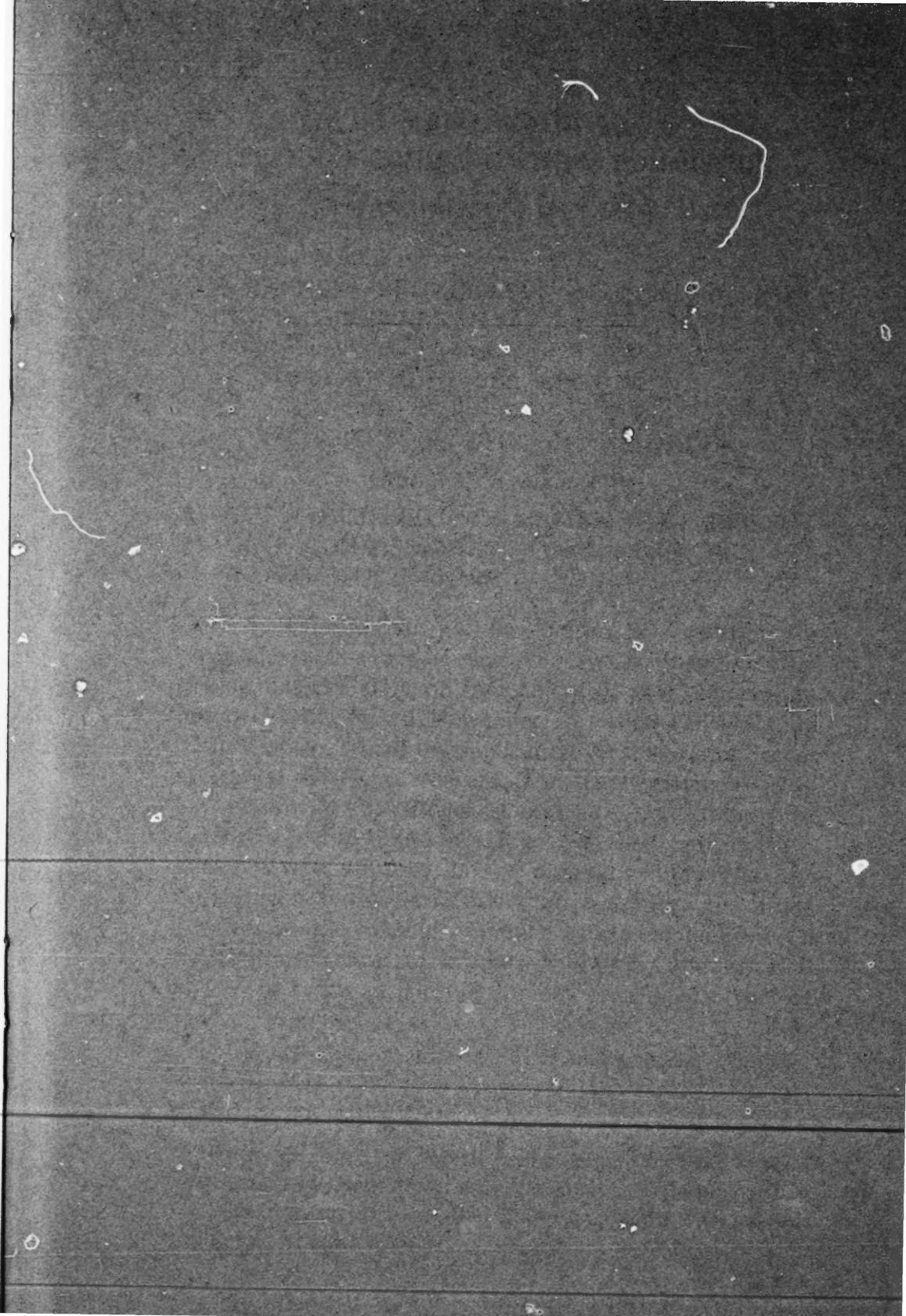
APPENDIX

RULINGS ON BROADCAST BUREAU'S EXCEPTIONS TO INITIAL DECISION

Exception No.	*Ruling*
1, 5	Granted to the extent indicated in the decision and denied in all other respects as being unnecessary for the purposes of the decision.
2	Granted as indicated in par. 9 of the decision.
3, 6	Denied as being unnecessary for the purposes of the decision.
4	Granted as indicated in par. 11 of the decision.
7-9	Granted as indicated in pars. 30-32 of the decision.
10	Granted as indicated in pars. 8 and 13 of the decision.
11-17	Granted as indicated in the decision.

DISSENTING STATEMENT OF CHAIRMAN ROSEL H. HYDE

I believe there should be a substantial penalty but that denial of license and deletion of the station is not warranted.



BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
CONTINENTAL BROADCAST-	)	Docket No. 16050
ING, INC., NEWARK, N.J.	)	File No. BR-174
For Renewal of License of	)	
Station WNJR, Newark, N.J.)		

MEMORANDUM OPINION AND ORDER

(Adopted May 1, 1969)

BY THE COMMISSION: CHAIRMAN HYDE DISSENTING; COMMISSIONERS COX AND H. REX LEE NOT PARTICIPATING.

1. The Commission has before it a petition for reconsideration and rehearing filed by Continental Broadcasting, Inc. (WNJR), on December 26, 1968, directed to our decision released November 27, 1968 (15 F.C.C.2d 120),[1] which denied the application for renewal of license of station WNJR at Newark, N.J. The Commission also has before it the Broadcast Bureau's opposition filed January 17, 1969, and WNJR's reply filed February 17, 1969.[2] WNJR requests, in the alternative: (1) That the Commission reconsider its decision and adopt the initial decision of the hearing examiner which recommended a short term renewal of license; or if the Commission is unable to reach such result for any reason, (2) that the

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[1] Commissioner Wadsworth for the Commission; Chairman Hyde dissenting and issuing a statement; Commissioners Cox and H. Rex Lee not participating.

[2] On Apr. 18, 1969, WNJR filed a petition for leave to file a supplement to its petition for reconsideration and rehearing and an accompanying supplement. The Broadcast Bureau opposed this petition on Apr. 30, 1969.

record be reopened to consider information bearing on the performance of WNJR, submitted with the petition. The Broadcast Bureau opposes the petition on the ground that WNJR has failed to provide any legal or factual basis for reconsideration.

2. Before considering each of the contentions made by WNJR in its petition for reconsideration, we believe it desirable to discuss certain statements made by WNJR in its reply to the Broadcast Bureau's opposition, concerning the basis of our decision. WNJR states (reply, pp. 5-6) that "this is not a case where the licensee has been held to have deceived the Commission"; that "the Commission expressly held that it was not basing its decision on any ruling that the conduct of Mirelson (the station manager) was chargeable as a misrepresentation to the licensee"; and that "the basis of the Commission's decision was limited solely to the holding that Rollins had not exercised adequate control over the station as a licensee." These statements do not correctly reflect our holding in this case on the question of misrepresentation and fraud and the licensee's responsibility for such deception and its consequent lack of qualifications to continue to be a licensee.

3. In our decision (par. 7) we adopted the examiner's findings and conclusions as to the concealment, misrepresentation, and fraud practiced by the station manager on the Commission and we expressly held that "the manager's gross misconduct and fraud on the Commission must be imputed to the licensee because of its failure to exercise adequate control and supervision over the management and operation of WNJR consistent with its responsibilities as a licensee." We cited as support for our holding our decisions in the *KRLA* and *KWK* cases,[3]

[3] *Eleven Ten Broadcasting Corp. (KRLA)*, 32 F.C.C. 706, 22 R.R. 699 (1962), reconsideration denied 33 F.C.C. 92, 22 R.R.

(Footnote 3 continued on next page)

where we denied a renewal and revoked a license, respectively, because of misrepresentation and fraud imputed to the licensees and for which the licensees were held responsible. The instant case involves gross misrepresentation and fraud practiced on the Commission and the licensee must be held responsible for the misconduct involved. In light of the evidence adduced under the issues, we concluded in our decision that the applicant did not have the necessary qualifications to continue to be a licensee of station WNJR. In accordance with the *WOKO*[4] principle, we held that the application for renewal of license should be denied.

4. WNJR contends, first, that we failed to give proper weight to the record of the licensee in establishing and maintaining controls over the operation of the station and that such controls refute any conclusion that the licensee was indifferent to its responsibilities. We recognized in our decision that the Rollins home office instituted a number of control procedures for its stations, including station WNJR, and we fully considered those procedures as set forth in the examiner's conclusions, paragraphs 24-27. In paragraph 18 of our decision we made specific reference to some of the more direct control procedures employed. However, we agreed with the examiner's conclusions (par. 28), to which no exception was taken by WNJR, that the described control and supervisory activities of those in the Rollins home office did not suffice to prevent serious violations of the

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(Footnote 3 continued from page 2)

702n (1962), affirmed *sub nom. Immaculate Conception Church of Los Angeles, et al.* v. *FCC* 116 U.S. App. D.C. 73, 320 F. 2d 795, 25 R.R. 2128a (1963), cert. denied 375 U.S. 904 (1963); *KWK Radio, Inc.*, 34 F.C.C. 1039 (1963), affirmed 119 U.S. App. D.C. 144, 337 F. 2d 540 (1964), cert. denied 380 U.S. 910 (1965).

[4] *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

Commission's rules as well as misconduct by station employees which reflect adversely on the renewal applicant. We do not agree with WNJR's contention that our evaluation improperly treats the question of the licensee's responsibility for station operation and staff performance. The preponderance of the record evidence supports the examiner's conclusion (par. 32), to which no exception was taken by WNJR and which we adopted in our decision (par. 16), that the licensee did not exercise adequate control or supervision over the operation of station WNJR in a manner consistent with its licensee responsibilities.

5. WNJR contends, next, that it should not be held responsible for the fraudulent acts of its manager, because he deliberately withheld the facts from the Rollins principals and they acted reasonably under the circumstances. WNJR made substantially the same argument in its reply to the Broadcast Bureau's exceptions and in its oral argument, and we considered and rejected the contention in our decision. The deliberate fraud practiced on the Commission by the station manager in connection with the "Celebrity Time" program and contacts is clearly established in the record. The fact that the licensee was misled by the actions of its manager in withholding facts from it and the fact that such actions were undertaken by him to protect his position with the home office, do not alter the fact that a gross and willful fraud was practiced on the Commission for which the licensee must be held responsible because of its failure to exercise adequate control and supervision over the operation of the station.

6. As set forth in our decision, the Rollins home office was repeatedly on notice, even as early as 1962, that questions concerning the manner of operation of the "Celebrity Time" program had been raised, but, as concluded by the examiner (par. 29), "at no time, was there any reasonably careful inspection of

the 'Celebrity Time' documents file made by the home office." As noted in our decision (par. 13), it is clear that a minimal degree of responsible supervision either during the period that the "Celebrity Time" program was broadcast or following its termination could have averted the unconscionable fraud which the station manager perpetrated on the Commission on April 15, 1964. WNJR now claims that when Rollins first became aware that something was wrong with the contract file for the "Celebrity Time" program, it immediately conducted its own investigation which unearthed the original contracts. However, what WNJR fails to make clear in this regard is that its investigation was not initiated until May 5, 1964, which was after the fraud had been perpetrated on the Commission and which was after the Commission sent a letter, dated April 23, 1964, to the licensee requesting answers to a number of questions concerning the bogus "Celebrity Time" documents which had been furnished to it on April 15, 1964 (examiner's findings, pars. 100-106).

7. WNJR contends, third, that our decision in this case is inconsistent with our decision in *Lamar Life Broadcasting Co. (WLBT),* 14 F.C.C. 2d 431 (1968), because we gave no weight to the corrective action taken by Rollins in this case, but did rely on corrective action by the licensee in the *Lamar* case. WNJR claims that under the doctrine of *Melody Music, Inc.* v. *FCC* 345 F.2d 730 (1965), both cases were required to be decided on the same principle, or the differences had to be explained. The fundamental distinction in the two cases is that in the *Lamar* case allegations of past serious misconduct were found not to have been proven, and it was only after the past misconduct was adjudged unsubstantiated that the more recent programing record of WLBT was considered (14 F.C.C. 2d at 437). In the instant case we found the applicant disqualified on the basis of its past misconduct. In this case the licensee's

past misconduct and its lack of requisite qualifications to be a licensee have been adjudged to be fatal to the station's renewal application. Our decision in this case is consistent with our holding in the *KRLA* and *KWK* cases, supra, where we did not permit current good performance to rehabilitate past bad conduct which warranted denial of a renewal application and revocation, respectively. Compare *FCC* v. *WOKO, Inc.*, supra. In the *Lamar* case the issues specified were resolved in the licensee's favor because the charges against the applicant were not proved. In the instant case we have resolved the issues adversely to the licensee because the charges have been proved, and we have concluded that the applicant does not possess the necessary qualifications to remain the licensee of station WNJR.

8. WNJR also claims that we have imposed in this case a more severe penalty than we did in a number of other cases where we excused certain conduct or imposed a forfeiture rather than denying a renewal of license.[5] None of the cases cited, however, involved a gross and willful fraud of the nature practiced in this case and none involved a failure on the part of the licensee to exercise adequate control and supervision over the operation of its station to the extent clearly established by the record in this case. Our choice of sanction in this case is based upon our consideration of the entire fact situation, and we believe that denial of renewal is the proper sanction under all of the circumstances. See *FCC* v. *WOKO, Inc.*, supra, and *Lorain Journal Company* v. *FCC*, 351 F.2d 824 (1965), cert, denied sub nom. *WWIZ, Inc.*, v. *FCC*, 383 U.S. 967 (1966).

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[5] WMJR cites the following cases: *United Broadcasting Co., Inc.*, 4 F.C.C. 2d 293 (1966); *Mark Twain Broadcasting Co.*, 21 R.R. 238 (1960); *Washington Broadcasting Co. (WOL)* 8 R.R. 2d 1267 (1966); *Dover Broadcasting Co.*, F.C.C. 62-1287 (1962); *Arthur Powell Williams*, 7 F.C.C. 2d 519 (1967); and *Meyer Broadcasting Co. (KFYR-TV)*, F.C.C. 64-104 (1964).

9. WNJR contends, finally, that we failed to give proper consideration to its overall program performance, particularly its public service programing, in evaluating its qualifications as a licensee. WNJR submitted with its petition letters from various organizations and other material which it claims demonstrate the character of its service, in the event the Commission is in doubt about its performance. WNJR requests that the record be reopened for consideration of these matters if the Commission cannot conclude that its performance was highly metitorious and outweighed the deficiencies which underlay the Commission's decision.

10. WNJR's overall program service was not placed in issue in this proceeding. The order of designation contained no general programing issue and none was requested by WNJR. The record shows that during the hearing, when asked about the matter by the examiner, counsel for WNJR stated that he did not intend to make any overall program showing by way of mitigation (T. 94-95) and further stated that "The question of actual programing was not in issue" (T. 3516). No attempt was made to adduce programing evidence at the hearing. WNJR now claims that consideration of its overall program performance is required because we relied upon programing considerations in our decision (footnote 19), and because all aspects of its program performance must be considered. It should be obvious from our decision that we did not rely on WNJR's program performance in arriving at our conclusion that the applicant did not have the necessary qualifications to continue to be the licensee of station WNJR. We decided this case on the basis of the evidence adduced under the issues specified in the order of designation. In footnote 19 we merely pointed out the examiner's conclusion as to what occurred as a further consequence of the licensee's lack of adequate control and supervision over the operation of the station. The question of the adequacy of the control

and supervision exercised over the station was specified in issue 3.

11. In the *KRLA* case, supra, where we denied a renewal of license because of the licensee's misconduct, it was contended on appeal to the U.S. Court of Appeals for the District of Columbia Circuit[6] that the Commission erred in failing to make findings as to KRLA's public service programing and to consider the public service rendered by KRLA in determining whether or not KRLA's license should be renewed. In affirming the Commission's decision, the Court said: "The Commission need not consider the public service rendered by a station where the licensee is disqualified by its attempts to deceive the Commission,"[7] citing *FCC* v. *WOKO, Inc.*, supra. This holding was subsequently cited with approval by the Court in *Lorian Journal Co.* v. *FCC*, supra. We believe that these decisions are controlling in this case. As stated above (pars. 2-3), this proceeding involves a gross misrepresentation and fraud practiced on the Commission by the licensee. We have found the licensee lacking in the necessary qualifications to continue to be a licensee. WNJR's request that the record be reopened for consideration of its public service programing will be denied.

12. On April 18, 1969, WNJR filed a supplement to its petition for reconsideration in which it contends that our recent actions in imposing forfeitures in the cases of *Camden Broadcasting Corp.* (WACA), F.C.C. 69-330, and *B & G Broadcasting, Inc.* (WJSW), F.C.C. 69-361, demonstrate a disparity in the treatment of WNJR and other licensee found guilty of violations and require that the sanction of forfeiture be considered as

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[6] *Immaculate Conception Church* v. *FCC*, 116 U.S. App. D.C. 73, 320 F.2d 795, cert. denied, 375 U.S. 904 (1963).

[7] 320 F. 2d at 797.

an alternative to the more severe action of denial of renewal of license in this case. In the *WACA* and *WJSW* cases we were of the view that the violations, although of a serious nature, did not warrant the institution of revocation or renewal proceedings. In each of those cases the Commission was not convinced that the charges against the licensee, if proven in an evidentiary hearing, would be sufficient to result in disqualification. Hence, a forfeiture was deemed the appropriate sanction. In the instant case, however, the WNJR renewal application was designated for hearing because of serious questions bearing in the qualifications of the applicant to remain the licensee of station WNJR. After hearing and based on the record evidence adduced under all of the issues, we determined that the licensee did not possess the necessary qualifications to continue to be the licensee of station WNJR. Since the applicant was found disqualified, we of course also concluded that a grant of the renewal application would not serve the public interest. It obviously would be contrary to the public interest and manifestly improper to permit a disqualified applicant to continue as a licensee through the imposition of a forfeiture. The *WACA* and *WJSW* cases provide no basis for a reconsideration of our resolution of the licensee qualifications issue in this case, and, consequently, provide no basis for the imposition of forfeiture in lieu of denial of the renewal application.

13. Accordingly, *It is ordered,* That the petition for leave to file supplement to petition for reconsideration and rehearing filed April 18, 1969, by Continental Broadcasting, Inc., *Is granted;* and

14. *It is further ordered,* That the petition for reconsideration and rehearing filed December 26, 1968, by Continental Broadcasting, Inc., *Is denied;* and

15. *It is further ordered,* That in order to enable Continental Broadcasting, Inc., to wind up its affairs, *It*

is authorized to operate station WNJR until 12:01 a.m., July 1, 1969; *Provided, however*, That if Continental seeks judicial review of our decision released November 27, 1968 (15 F.C.C. 2d 120) and/or of this memorandum opinion and order, Continental is authorized to continue to operate station WNJR until thirty (30) days after the final disposition of such appeal.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.